in the

Supreme Court

of the

United States

October Term, 1979

No. 79-130

JOHN E. BEHNKE,

Appellant,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

MOTION TO DISMISS OR AFFIRM

Lee H. Gaudineer
600 Hubbell Building
Des Moines, Iowa 50309

Hedo M. Zacherle
1101 Fleming Building
Des Moines, Iowa 50309

ATTORNEYS FOR APPELLEE

August 10, 1979

INDEX

CITATIONS

in the

Supreme Court

of the

United States

October Term, 1979

No. 79-130

JOHN E. BEHNKE,

Appellant,

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

---

in the

Supreme Court of the United States

October Term, 1979

No. 79-130

JOHN E. BEHNKE, *Appellant,*

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF IOWA

MOTION TO DISMISS OR AFFIRM

The Appellee, The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, respectfully moves the Court to dismiss the appeal in the above-captioned case, or in the alternative, to affirm judgment of the Supreme Court of Iowa on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Iowa is reported below as *The Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke*, 276 N.W.2d 838 (Ia. 1979).

JURISDICTION

The Supreme Court of Iowa entered judgment on March 21, 1979, suspending the Appellant from the practice of law in the State of Iowa for a period of three years. The Supreme Court of Iowa denied Appellant's petition for rehearing of the case on April 19, 1979. Notice of Appeal to this Court was timely filed in the Supreme Court of Iowa on July 11, 1979. Appellant asserts in his jurisdictional statement that the Court has jurisdiction by reason of Title 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellant claims in his jurisdictional statement that his suspension from the practice of law was in violation of his due process rights under the Fourteenth Amendment of the Constitution. Appellant was suspended for naming himself beneficially in a will he drafted for a client. This has always been proscribed. This long standing proscription was at all times here material part of the

Iowa Code of Professional Responsibility for Lawyers, Ethical Considerations 5-5 and 5-6, 40 *Iowa Code Ann.* 497 (1975) (now transferred to DR5-101(B)), which states as follows:

> "EC 5-5. A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."
>
> "EC 5-6. A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

QUESTION PRESENTED

Whether a reasonably informed Iowa lawyer possessing a modicum of ethical values could fail to be apprised that drafting a will for a client which names the lawyer beneficially is unethical.

STATEMENT OF THE CASE

The Supreme Court of Iowa entered judgment on March 21, 1979, suspending the Appellant from the practice of law in the State of Iowa for a period of three years.

The Appellee, The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, is charged under Iowa Supreme Court Rule 118 with the responsibility to prosecute complaints against any attorney licensed to practice law in Iowa for ethical violations. The Grievance Commission of the Supreme Court of Iowa holds a hearing to collect the evidence and thereafter makes findings of fact and either dismisses the complaint or recommends that the Iowa Supreme Court take disciplinary action.

The Respondent was charged with naming himself beneficially and as the executor in a will he drafted for a client. These prohibitions were then contained in Ethical Considerations 5-5 and 5-6 of the *Iowa Code of Professional Resonsibility for Lawyers.* The Grievance Commission found that these charges were proven by a clear and convincing preponderance of the evidence. The Supreme Court of Iowa upon a de novo review of the

evidence sustained the findings of fact as supported by a clear and convincing preponderance of the evidence. (J.S. pp. 13a-19a). Appellant does not challenge the findings of fact of the Grievance Commission or the Supreme Court of Iowa as unsupported by the evidence. Appellant raises on this appeal a single question of due process under the Fourteenth Amendment to the Constitution.

The relevant facts (all known to the Appellant) upon which the Grievance Commission and Supreme Court of Iowa found Appellant was guilty of unethical conduct are as follows:

1. Eilert and Nellie Wumkes were clients of the Appellant. He drafted wills for them in 1963 in which he was named executor but not a beneficiary.

2. In April of 1972 another attorney was contacted by the Wumkeses to draft a second set of wills. Appellant was not named either as an executor or beneficiary. Nellie Wumkes stated to this attorney that she was dissatisfied with Appellant as an attorney and "didn't trust him."

3. In June of 1973, a third set of wills was drafted by yet another attorney. Appellant was not a beneficiary under these wills.

4. In November of 1974, Appellant prepared a will for Nellie Wumkes. He was not a beneficiary.

5. On January 31, 1975, Eilert and Nellie Wumkes (now quite elderly) executed wills prepared by the Appellant wherein he was named a contingent beneficiary of 160 acres of Iowa farmland worth $320,000.

6. The Wumkeses repudiated these wills on February 14, 1975. Nellie showed an attorney (not Appellant) the devise to Appellant and said "that isn't what we want in our wills." This attorney then prepared codicils reaffirming the provisions of the June, 1973 wills. Also, in early March of 1975 new wills were executed reaffirming the provisions of the June 1973 wills in which Appellant was not a beneficiary.

7. On March 15, 1975, Nellie sustained a head injury which her doctor stated left her in a "confused condition."

8. On April 29, 1975, Eilert was admitted to a hospital with a stroke. He was eighty seven years old and in poor mental and physical health. On June 1, 1975, he was transferred to a nursing home where he remained for the rest of his life.

9. On June 11, 1975, Appellant, at the nursing home, obtained Eilert's signature on a will identical to the one prepared in January by Appellant in which he was the last contingent devisee to the 160 acre Iowa farm.

10. Shortly thereafter, Eilert and Nellie Wumkes filed voluntary petitions for appointment of conservatorships which were prepared by an attorney other than Appellant.

11. Eilert died in October, 1975 and Nellie offered the March, 1975 will for probate. Appellant petitioned to set aside the probate of this will and to probate the one naming him beneficially.

12. In February, 1976, Appellant obtained the signature of Nellie Wumkes, who at the time was confined to a nursing home, on a petition to terminate the conservatorships. The petition was denied in May 1976.

The Supreme Court of Iowa found the Appellant's conduct under these circumstances to be unethical:

> "We cannot find anything exceptional in the above circumstances. Lawyers involved in probate and estate planning often observe the syndrome evidenced here: the frustration and vacillation of wealthy and childless old persons without close family ties. The resulting vulnerability enhances the EC 5-5 requirement. Another lawyer selected by the client should draft the instrument which beneficially names the client's lawyer." *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke,* 276 N.W.2d 838, 846 (Ia. 1979).

ARGUMENT

I.

The State of Iowa has a compelling interest in maintaining the integrity of its bar to promote public respect for the processes of judicial administration. Iowa, in furtherance of this interest, may constitutionally require an attorney to demonstrate "good moral character" as a condition to his continued practice of law in Iowa. The essence of good moral character is being able to tell right from wrong. The attorney-client relationship is a fiduciary one requiring the highest standard of trust and confidence. The attorney must exercise his independent judgment only for the benefit of the client. He cannot do this if he has a pecuniary (self) interest or can personally benefit from the advice given.

The *Code* is read and applied as a whole; not in a piecemeal fashion as contended by the Appellant. The *Code* articulates the standards of conduct for lawyers that the Courts have always recognized and applied. From Canon 1 through Canon 9, the *Code* is simply a restatement of the high standards to which lawyers have always been held. The Canons emphasize and establish that the cornerstone of the attorney-client relationship is the lawyer's honesty, integrity, and truthfulness; i.e. good moral character.

For example, the very first Ethical Consideration provides:

> "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards it the ethical responsibility of every lawyer."

EC 9-1 provides:

> "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our legal system and in the legal profession."

The Appellant utterly failed to even begin to discharge his professional responsibility to the Wumkeses. Part and parcel of the Appellant's fiduciary duty to the Wumkeses was that he "should insist" that their will, if it was to name him beneficially, be prepared by another who was "cognizant of the circumstances" and could give "disinterested advice." Iowa has a definite interest in insuring that a lawyer's fiduciary duty to his clients is discharged. This is the sense of the Iowa Supreme Court's action herein (A. p. 11a-13a) and in *In Re Frerichs*, 238

N.W.2d 764 (Ia. 1976) (duty to the court and the system of justice). It is not a witch hunt to require that lawyers discharge their professional responsibility.

This Court has long recognized that States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). The interest of the States in regulating lawyers is especially great since lawyers are essential to the administration of justice. *Cohen v. Hurley,* 366 U.S. 117 123-124, 81 S.Ct. 954, 958 6 L.Ed.2d d156 (1961). The Supreme Court of Iowa has the inherent power to discipline those lawyers whose conduct is found to be unprofessional. *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). One precondition that may be constitutionally imposed upon a member of the bar is that he demonstrate "good moral character." *Konigsberg v. State Bar of California,*

353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); *Schware v. Board of Examiners of New Mexico,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Iowa has long required that lawyers must demonstrate good moral character as a requisite for continuing the practice of law. *State v. Rohrig,* 159 Iowa 725, 139 N.W. 908, 912 (1913).

John Behnke, the Appellant, believes that he could no more be "convicted" of violating an ethical consideration than he could of violating a Biblical Commandment. With all due respect, the *Code of Professional Responsibility* does not state anywhere, "Thou Shalt Not Abuse A Client's Confidence." Yet, adherance to this command has always been required of lawyers and now is explicit throughout the *Code of Professional Responsibility for Lawyers.*

John Behnke would have the Court read into the *Code of Professional Responsibility* all of the requirements of precision of expression demanded of criminal statutes. Such an interpretation defeats the spirit and purpose of the *Code* by imposing a rigid classification of "crimes".

The practice of law is a profession requiring advanced education and training. Part and parcel of this advanced education and training encompasses knowledge of the lawyer's professional responsibility. A lawyer must know and appreciate the ethics of the profession without

being told their application to each specific factual situation in explicit language. The present *Code of Professional Responsibility* was drafted by lawyers, after a lengthy study, to provide a single document articulating most, but not all, of these existing ethical standards. While it is true that a layman should be informed in language that is as precise as possible what conduct will subject him to criminal sanctions, the same is not true for members of a professional or a particular trade (assuming arguendo that disciplinary sanctions can be equated to criminal ones). This requirement is less strict because of the affluence, knowledge, and education of these parties. *Boyce Motor Lines, Inc. v. U.S.*, 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367, 371 (1952) and *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

Lawyers know they are held to high standards. The *Code of Professional Responsibility* is read as a whole and applied to a given situation. When a reasonable attorney, knowing of these high standards, would know that his conduct was unethical, there is no problem of vagueness. *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 444 (1978) and *Ohralik v. Ohio State Bar*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 444 (1978).

Bouie v. Columbia, 378 U.S. 347, is plainly inapposite to the case at bar because that case involved the due process right to notice that a criminal defendant's conduct would be in violation of the law. *Bouie* does not involve the standards and duties imposed upon lawyers by the *Code of Professional Responsibility*.

II.

A reasonable attorney would know that John Behnke's conduct in drafting a will in which he was named beneficially would subject him to disciplinary action.

In the case of *In Re Ruffalo* 390 U.S. 544, 555, 88 S.Ct. 1222, 1228, 20 L.Ed.2d 117 (1968), Mr. Justice White in his concurrence made a statement that is appropos to this case:

> "A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be demed to have been on notice that the courts would condem the conduct for which he was removed ...
>
> **********
>
> Even when a disbarment standard is as inspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as *malum in se*. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession."

Ethical Consideration 5-5 is not unspecific as was the standard in question in *Ruffalo*. Ethical Consideration 5-5 is certain and specific: "an attorney shall not draft a will in which he is beneficially named."

The conduct now articulated as proscribed by EC 5-5 is a restatement of old Canon 9, *Canons of the American Bar Association. Cross Index to the Code of Professional Responsibility, American Bar Association.* The footnotes from EC 5-5 and EC 5-6 also establish that this conduct has long been proscribed. The case of *In Re Jones,* 254 Ore. 617, 462 P.2d 680 (1969) flatly states that this is conduct which an attorney need not be told is blantantly wrong. States which had ruled on the question prior to the time Appellant named himself beneficially, unanimously condemned the practice. *In Re Moore,* 218 Ore. 403, 345 P.2d 411 (1959); *In Re Kneeland,* 233 Ore. 241, 377 P.2d 861 (1963); *Columbus Bar v. Ramey,* 32 Ohio St.2d 91, 61 Ohio App. 338, 290 N.E. 2d 831 (1972); *In Re Krotenburg,* 111 Ariz. 251, 527 P.2d 510 (1974); *Lantz v. State Bar of California,* 212 Cal. 213, 298 P. 497 (1931); *In Re MacFarlane,* 10 Utah2d 217, 350 P.2d 631; *In Re Vilkomerson,* 270 App. Div. 166, 58 N.Y.S.2d 922 (1945); *In Re Anderson,* 287 N.E. 2d. 682 (Ill. 1972); see also the numerous cases cited at 98 A.L.R.2d 1234. These authorities establish:

1. A reasonably informed attorney would be on notice that his conduct in drafting a will in which he is named beneficially will subject him to disciplinary sanctions.

This has long been the rule established by cases decided well before Behnke's conduct in 1975, so that Appellant's claim of lack of "notice" is without merit.

2. The prohibition contained in EC 5-5 is based on the long and unhappy experience of the bar in attempting to regulate situations fraught with potential for overreaching and abusing clients. EC 5-5 is merely the current articulation of a long standing prohibition.

This Court has stated that states may take broad measures to correct the substantive evils of undue influence, overreaching, misrepresentation, and conflict of interests. *In Re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 444 (1978). Ethical Consideration 5-5 is a very explicit attempt to regulate a recurring situation in the professional lives of attorneys. The flat prohibition in EC 5-5 that an attorney shall not draft a will in which he is named beneficially serves a legitimate regulatory purpose. The potential for overreaching inherent when an attorney undertakes to draft a will for a client in which the attorney is to be named beneficially is real. States may take reasonable steps to correct this evil. This is all that Iowa has done in this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Appeal, or in the alternative, affirm the judgment of the Supreme Court of Iowa.

Respectfully submitted,

/s/ Lee H. Gaudineer
Lee H. Gaudineer

600 Hubbell Building
Des Moines, Iowa 50309

/s/ Hedo M. Zacherle
Hedo M. Zacherle

1101 Fleming Building
Des Moines, Iowa 50309

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to HUGO L. BLACK, JR. ESQ., Kelly, Black, Black, Wright & Earle, P.A., 1400 Alfred I. duPont Building, Miami, Florida 33131, this 10th day of August, 1979.

/s/ Lee H. Gaudineer
Lee H. Gaudineer